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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1944.

No. 404

IN THE MATTER OF
PEER MANOR BUILDING CORPORATION,
Debtor.

W. D. WITTER AND J. MARSHALL PEER,
Petitioners,

vs.

G. J. NIKOLAS, G. J. NIKOLAS & COMPANY, INC., AND HARRY FOOTE, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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INDEX.

PAGE

Petition:

Statement of matter involved 2-4

Questions presented 4-5

Reasons for issuance of writ 5-7

Brief:

A statement of the case 9-12

Specification of errors 12-13

Summary of argument 14-16

The argument 17-45

Conclusion 46

Table of Cases.

Barry v. Commonwealth Edison Co., 374 Ill. 473..... 21

Bowles v. Capital Packing Co., 143 F. (2) 87..... 21

Burkhardt v. German-American Bank, 137 F. 958.... 36

Butler Mfg. Co. v. Dept. of Fin., 383 Ill. 220.....27, 29, 42

Cahill v. Plumbers, et al., 238 Ill. App. 123..... 29

Chas. A. Zahn Co. v. United States, 6 Fed. Supp. 317.. 39

Chicago Board of Trade v. Johnson, 264 U. S. 1..... 41

City of Chicago v. Partridge, 248 Ill. 442..... 21

Crocker v. Commissioner of Internal Revenue, 84 F. (2) 64 27

Fidelity Ins. Ass. v. Sims, 318 U. S. 608 41

Forty-one Thirty-six Wilcox Building Corporation, In re: 302 U. S. 120.....6, 39

Goumaris v. Pavlakas, 202 Ill. App. 268..... 21

Gulf Lines R. R. v. Golconda Ry., 290 Ill. 384..... 41
Hanna v. Read, 102 Ill. 596 22
Hodgsen v. Baldwin, 65 Ill. 532 24
Hopkins Federal Savings & Loan Association v. Cleary, 296 U. S. 337 40
Hunter v. Winter, 268 Ill. App. 487 25
Loverin v. McLaughlin, 161 Ill. 417 28
Marine Properties v. Trust Co., 317 U. S. 78..... 45
Markus v. C. T. & T. Co., 273 Ill. 557..... 29
Moskal v. New Era Com. Ass., 228 Ill. App. 280..... 29
Mumma v. The Potomac Co., 8 Pet. 281.....6, 39
Oklahoma Gas Co. v. Oklahoma, 273 U. S. 257.....6, 39
People ex-rel. De Cola v. United States Fidelity & Guaranty Co., 306 Ill. App. 518..... 21
Peer Manor Bldg Corp., 134 F. (2) 839.....2, 17, 19
People ex-rel. Modern Woodmen of America v. Circuit Court, 347 Ill. 34 21
Pilsen Brewing Co. v. Wallace, 291 Ill. 59..... 25
Pope & Cottle Co. v. Fairbanks Realty Co., 124 F. (2) 132 .....24, 33
Reihm v. Clough-Reihm Co., 234 Ill. App. 199..... 21
R. F. C. v. Teter, 117 Fed. (2) 716..... 27
Robinson v. New York Cent. R. Co., 283 Ill. 334..... 26
Saco-Lowell Shops v. Reynolds, 141 Fed. (2), 587.... 23
Sarelas v. McCue, 291 Ill. App. 540..... 39
Schwartz v. Witwer Grocer Co., 141 Fed. (2), 341...23, 31
Skolnik v. Petella, 376 Ill. 500 21
United States v. Safeway Stores, 140 F. (2) 835..... 26
State Bank v. Brown, 317 U. S. 135..... 41

STATUTES CITED.

Federal Rules of Civil Procedure, Rule 52..... 23
Section 1, (8) Title 11, U. S. C. A.....24, 37
Chapter X, Section 130 (1) and (3)..... 29
Chapter 32, Sec. 157.150—Smith-Hurd Ill. Ann. St. (1943 Ed.) 28

OTHER CITATIONS.

47 A. L. R. page 1394 26
8 C. J. S. page 511 36

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PETITION FOR WRIT OF CERTIORARI.

Petitioners J. Marshall Peer and W. D. Witter, jointly and severally petition that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the 7th Circuit entered June 16, 1944, reversing the judgment of the District Court (dismissing the involuntary petition of the respondents to reorganize

Peer Manor Building Corporation) with directions to proceed with the reorganization of said debtor and denying the petition for rehearing, to the end that its judgment may be reversed, with directions to sustain the order of the District Court and to dismiss the proceedings for corporate reorganization.

Statement of the Matter Involved.

On December 5, 1941 the respondents filed a petition to reorganize the Peer Manor Building Corporation under Chapter X of the Bankruptcy Act and alleged that the debtor was a corporation under Chapter X which could be reorganized under that Act. After the approval of the petition and appointment of a Trustee, an appeal was prosecuted to the United States Circuit Court of Appeals for the Seventh Circuit and in the opinion rendered on March 26, 1943 (134 F. (2) 839), the order approving the petition and appointing the Trustee was reversed on the ground that the Peer Manor Building Corporation was dissolved in 1934 and was neither a *de jure* nor a *de facto* corporation.

The majority of the court based its decision upon the opinion of this court in *In re Forty One Thirty Six Wilcox Building Corporation* (302 U. S. 120) which held that under Illinois law a corporation dissolved for more than two years could not file a voluntary petition for reorganization. The majority of the court applied the same rule to an involuntary proceeding against a dissolved corporation and overruled its previous decisions to the contrary on the ground that the positive implications of law of the Wilcox case were "at war" with the Circuit Court's former decisions.

Judge Evans dissented and held that it was a *de facto* corporation and could be reorganized as such.

In their petition for a writ of certiorari to this court the respondents urged that the Court of Appeals erred when it failed to consider that under Chapter X "unincorporated companies and associations" are included and argued that the Peer Manor Building Corporation was either a *de facto* corporation or an "unincorporated company". This court denied the writ on June 21, 1943 (320 U. S. 211).

On July 8, 1943, respondents again invoked the jurisdiction of the Bankruptcy Court by a second petition (R. 2-10) which alleged that the Peer Manor Building Corporation was an "unincorporated company" and as such it could be reorganized under Chapter X. Petitioner J. Marshall Peer filed an answer (R. 11-20) denying that the Peer Manor Building Corporation was an unincorporated company and claiming the adjudication on the former appeal as a bar to the new proceedings. Petitioner W. D. Witter filed a motion to dismiss based on the same grounds (R. 22-29). Evidence was taken by the court on the issues thus presented and on November 23, 1943, the court filed its findings of fact and conclusions of law (R. 63-64). The District Court found that the question of jurisdiction was the same question which was involved in the proceedings on the prior appeal, that the evidence did not show that there was any association or unincorporated company which could be adjudicated bankrupt under the Bankruptcy Act and that the issues decided on the former appeal constituted an adjudication of the issues presented by the second petition. Pursuant to such findings and conclusions, the District Court entered its order of September 14, 1943, dismissing the proceedings.

On June 16, 1944, the Court of Appeals reversed the decision of the District Court with directions to proceed with the reorganization of the debtor. Mr. Justice Evans,

who wrote the dissenting opinion on the former appeal holding that the Peer Manor Building Corporation was a *de facto* corporation, now wrote the opinion for the court to the effect that the Peer Manor Building Corporation was an "unincorporated company" which could be reorganized as a corporation under Chapter X, and that the District Court erred when it held to the contrary.

It is sought by the petitioners to review the decision of the Court of Appeals so that its judgment may be reversed and the judgment of the District Court be sustained.

The Questions Presented.

The following questions are presented:

1. Whether petitioning creditors who previously invoked the jurisdiction of the Bankruptcy Court to reorganize a dissolved corporation under Chapter X as a *de facto* corporation and who sought in their petition for rehearing and in the petition for certiorari presented to this court to sustain the jurisdiction below on the ground that the corporation was an "unincorporated company", may, after the adjudication by the Court of Appeals adversely to their contentions (and the denial of certiorari by this court), thereafter again invoke the jurisdiction of the Bankruptcy Court to reorganize the corporation under Chapter X as an unincorporated company?

2. Whether a corporation which was prohibited by the law of Illinois from operating its corporate business when its charter was revoked, and which continued to operate its business as a corporation in defiance of the state law, may be treated as an "unincorporated company" and be reorganized as a corporation under Chapter X, in the absence of any organization or association by the former members thereof to operate the business as an "unincorporated company", and when the property of the dissolved corporation

was managed in its corporate name by one of its former officers and when the only acts relied upon as constituting doing business are the execution of certain instruments by two former officers purporting to act for a corporation in their official capacity as corporate officers many years after the dissolution of the corporation?

3. Does the term "unincorporated companies" of the Bankruptcy Act include an Illinois corporation which had been dissolved more than eight years prior to the filing of a petition against it, where two of the former officers carried on the business in the corporate name and became liable individually under the Illinois law for debts incurred while so operating the business?

Reasons Relied Upon for the Allowance of the Writ.

The reasons relied upon for the allowance of the writ herein are:

1. The construction of Section 1 (8) of the Bankruptcy Act that there can be an unincorporated company capable of being reorganized under Chapter X without any persons consenting to form such a company and by the mere fact that after the legal dissolution of the corporation, some of its officers continued to act in its corporate name, is in conflict with the construction of this section by the Circuit Court of Appeals of the First Circuit.

2. The question whether a dissolved corporation, which is operated as a corporation in defiance of Illinois law, by two former officers, may be reorganized as a corporation under Chapter X of the Bankruptcy Act, by Involuntary proceedings instituted against it on the theory that it is an "unincorporated company", is an important question of federal law which should be settled by this court. Otherwise, the law will remain uncertain in view of the principle expressed by this court in *Oklahoma Gas Co.* v.

Oklahoma, 273 U. S. 257, *Mumma* v. *Potomac Co.*, 8 Pet. 281, *In Re 4136 Wilcox Bldg. Corporation*, 302 U. S. 120, that upon dissolution, a corporation ceases to exist for any purpose whatsoever.

3. The Circuit Court of Appeals has decided an important question contrary to federal and state law, which if permitted to stand will cause much confusion, in that it has held that after the Court had on a previous appeal ruled that dissolved corporations could not be proceeded against under Chapter X of the Bankruptcy Act because it was neither a *de jure* nor a *de facto* corporation, and after a petition for a Writ of Certiorari which urged that it was an "unincorporated company" had been denied that a second petition for reorganization could be filed by the same parties seeking identical relief.

4. The Circuit Court of Appeals has decided an important question of local law in conflict with applicable local decisions, in that:

(a) An unincorporated company under Illinois law constitutes an unlimited partnership and partnerships are expressly excluded from corporate reorganization under Chapter X.

(b) The Illinois law holds that upon dissolution of a corporation title to the property vests in the former shareholders of the corporation, as tenants in common and tenants in common are regarded as partners with respect to the joint property.

5. The Circuit Court of Appeals has decided the important problem of *res judicata* in conflict with local and federal decisions:

(a) Its holding that the same parties who had previously been defeated in their attempts to reorganize a dissolved corporation under Chapter X may file a new proceeding to reorganize the same dissolved corporation, using as a basis the same claims and seeking the identical relief, is a departure from the ac-

cepted legal principles that all matters which were or might have been litigated cannot be relitigated by the same parties in an action involving the same subject matter and relief sought.

(b) Such a decision if allowed to stand would cause untold confusion.

6. The questions involved are of public interest, in that:

(a) They involve the right of the State of Illinois to control the existence and duration of corporations which it creates and the right to declare the legal consequences flowing from a dissolution of the corporation, and the carrying on of the business by former officers in their capacity of officers and on behalf of the non-existent corporation.

(b) They involve the right of the State of Illinois to declare that there can be no *de facto* corporations and that partnership liability results from an attempt to operate as a corporation where none exists.

(c) They also involve important principles upon which personal and property rights depend. If a dissolved corporation is continued indefinitely for the purpose of enabling a petition in bankruptcy to be filed against it after its complete extinction under state law, on the theory that it is an unincorporated company and this fictional entity can in the meantime acquire and convey property and exercise other corporate powers, a condition of uncertainty will arise as to title to real and personal property in the State of Illinois and doubt will be cast upon every transaction concerning property in which the corporation might have had an interest.

(d) They involve the right of a court to judicially legislate and create an entity where none is recognized by the Illinois law.

(e) They involve a construction of Chapter X and whether it was the intent of Congress to reorganize dissolved corporations whose officers conducted its business in the corporate name in violation of state law.

Prayer for Relief.

WHEREFORE, petitioners, jointly and severally pray that this petition for a writ of certiorari may be granted and that this Court proceed as provided by law and the rules of this Court in such cases, and that upon final hearing, the judgment of the United States Circuit Court of Appeals for the Seventh Circuit be reversed.

Respectfully submitted,

MEYER ABRAMS,
HAROLD J. GREEN,
MAURICE H. KAMM,
Counsel for Petitioners.

Chicago, Illinois,
August 24, 1944.